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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

CARROL BOYES (PTY) LIMITED, a
South African Company,

Plaintiff,

vs.

CARROL BOYES US DISTRIBUTION,
INC., a California Corporation; BARRY
SENDER, an individual; and UTi,
UNITED STATES, INC., a New York
Corporation,

Defendants.

CARROL BOYES US DISTRIBUTION,
INC., a California Corporation

Counterclaimant,

vs.

CARROL BOYES (PTY) LIMITED, a
South African Company, CARROL
BOYES, an individual, and DAVID
THIES, an individual,

Counterdefendants.

Case No. 8:15-cv-00312

**FIRST AMENDED
COUNTERCLAIM FOR:**

- 1. Breach of Contract**
- 2. Breach of the Covenant of Good Faith and Fair Dealing**
- 3. Franchisor's Failure to Register Franchise [Corp. Code, §§ 31300, 31110]**
- 4. Franchisor's Failure to Deliver Offering Circular [Corp. Code §§ 31300, 31119]**
- 5. Franchisor Unlawfully Terminated Franchise [Bus. & Prof. Code, § 20035]**
- 6. Breach of Fiduciary Duty [Against CB Limited]**
- 7. Fraud and Deceit [Civ. Code § 1709]**
- 8. Breach of Fiduciary Duty [Against Mr. Thies]**

1 Counterclaimant, CARROL BOYES US DISTRIBUTION, INC., a California
2 Corporation, alleges for its First Amended Counterclaim as follows:

3 **PARTIES**

4 1. Counterclaimant CARROL BOYES US DISTRIBUTION, INC., a
5 California Corporation (hereinafter “Counterclaimant” or “CBUSD”) is, and at all
6 relevant times was, a corporation duly organized and existing under the laws of the
7 State of California with its principal place of business in Orange County, California.

8 2. Counterclaimant is informed and believes and, based thereon, alleges
9 that Plaintiff and Counterdefendant CARROL BOYES (PTY) LIMITED (“CB
10 Limited”), registration No. 2007/008786/07, is an unknown South African entity
11 doing intrastate business in the State of California but not registered with the
12 Secretary of State.

13 3. CBUSD alleges that Counterdefendant Carrol Boyes (“Ms. Boyes”) is
14 an individual residing in the South Africa, and is the sole shareholder and was at
15 some operative times the Chief Executive Officer of CB Limited.

16 4. CBUSD alleges that Counterdefendant David Thies (“Mr. Thies”) is an
17 individual residing in the South Africa and is or was the Chief Financial Officer of
18 CB Limited.

19 5. CBUSD is informed and believes, and based thereon alleges, that at all
20 times herein mentioned, Ms. Boyes and Mr. Thies, and each of them, were and are
21 (for purposes of the law of tort, contract and otherwise) agents, representatives,
22 servants, associates, co-conspirators, and employees of CB Limited and its
23 predecessors and successors-in-interest, and were acting within the course and scope
24 of such capacities, within actual or apparent authority of such capacities, within the
25 course and scope of such conspiracies, and with actual and/or constructive notice of
26 the knowledge of their predecessors-in-interest and each other.

27 6. CBUSD is informed and believes, and based thereon alleges, that Ms.
28 Boyes is, and at all relevant times was, the sole owner and an officer of CB Limited



1 and there at all times existed a unity of interest between such Counterdefendants
2 such that any separateness between Ms. Boyes and CB Limited ceased to exist and
3 CB Limited is the alter ego of Ms. Boyes. Adherence to the fiction of the separate
4 existence of CB Limited would permit abuse of the corporate privilege and would
5 sanction fraud and produce an inequitable result for the following reasons:

6 a. CBUSD is informed and believes that CB Limited was and is a
7 mere shell and sham, without capital, assets, stock or stockholders and is used by
8 Ms. Boyes as a device to avoid individual liability;

9 b. CBUSD is informed and believes that CB Limited is, and at all
10 relevant times was, so inadequately capitalized that, compared with the business
11 done by CB Limited and the risk of loss attendant thereto, its capitalization was
12 illusory;

13 c. CBUSD is informed and believes that CB Limited was the alter
14 ego of Ms. Boyes in that Ms. Boyes used the assets of CB Limited for her own
15 personal use;

16 d. CBUSD is informed and believes that CB Limited is a mere
17 shell, instrumentality and conduit through which Ms. Boyes carried on her business
18 to the extent that any individuality between Ms. Boyes and CB Limited does not
19 now, and at all relevant times, did not exist.

20 e. CBUSD is informed and believes that CB Limited is, and at all
21 relevant times was, controlled, dominated and operated by Ms. Boyes in that the
22 activities of CB Limited were carried out without regard to corporate formalities
23 such as director or shareholder meetings, or minutes or resolutions maintained; and

24 f. CBUSD alleges that adherence to the fiction of the separate
25 existence of CB Limited would permit abuse of the corporate privilege and would
26 sanction fraud and would produce an inequitable result.

27 7. Hereafter, CB Limited and Ms. Boyes will sometimes be collectively
28 referred to as "CB Limited" unless otherwise expressly referred to separately.

JURISDICTION AND VENUE

8. This court has subject matter jurisdiction pursuant to 28 U.S.C. §1367(a) and Federal Rules of Civil Procedure, Rule 13(a) insofar as this is a compulsory counterclaim. This court also has subject matter jurisdiction pursuant to 28 U.S.C. §1332 because the parties have a diversity of citizenship and the amount in controversy in this matter, excluding costs and interest, exceeds the sum of \$75,000.

9. Venue is proper in this court pursuant to 28 U.S.C. § 1391.

FACTUAL BACKGROUND

10. CB Limited designs and manufactures high-end housewares and lifestyle accessories with sculpted designs (the “Products”). These Products carry the Carrol Boyes mark and retail for premium prices.

11. CBUSD’s principal, Mr. Barry Sender, first began doing business with CB Limited through a retail store located in Orange County, California. On October 18, 2010, Mr. Sender and CB Limited entered into a Licensing and Supply Agreement (the “Licensing Agreement”) providing terms for Mr. Sender to open a retail store exclusively selling CB Limited’s products. Under that Licensing Agreement, CB Limited demanded and Mr. Sender agreed to pay “a license fee to CB of (five percent) 5% of the sales value of the Products sold each month.”

12. During the time that the parties were operating under the Licensing Agreement, Mr. Sender and CB Limited began discussing marketing and wholesaling the Products in the United States. Mr. Sender negotiated the terms of the relationship with Mr. Thies and Ms. Boyes.

13. In June 2012, CBUSD and CB Limited entered into the Exclusive Wholesale Licensing, Supply, Sales & Distribution Agreement (the “Distribution Agreement” or the “Agreement”) setting forth terms for the exclusive wholesale distribution of the Products. A copy of the Distribution Agreement is attached hereto as Exhibit 1, and incorporated herein by reference.

1 14. Through the Distribution Agreement, CB Limited granted to CBUSD
2 the exclusive right to be the wholesale distributor of CB Limited's Products within
3 the United States. The operation of CBUSD's business was always exclusively
4 associated with CB Limited's trademarks, including CBUSD's name, its website
5 and all other marketing and communications with its customers.

6 15. In connection with the negotiations leading up to the Distribution
7 Agreement, CBUSD agreed to and did transfer 5% of its common stock to CB
8 Limited as an inducement to enter into the Distribution Agreement. This was the
9 same percentage required by CB Limited to be paid under the Licensing Agreement.
10 Towards the end of the negotiations over the Distribution Agreement, Ms. Boyes
11 and Mr. Thies made it clear that the additional rights of exclusive wholesale
12 distribution would only be granted if Mr. Sender would provide an additional
13 incentive to Ms. Boyes. The parties discussed Mr. Sender transferring an ownership
14 interest in CBUSD to one of Ms. Boyes's companies "as partial consideration" for
15 entering into the Distribution Agreement. Mr. Sender agreed and the parties entered
16 in the Distribution Agreement. Thereafter, counsel drafted a Subscription
17 Agreement entered into as of August 30, 2012 (the "Subscription Agreement")
18 whereby CBUSD agreed to transfer 10,000 shares of common stock, or about 5% of
19 the company, to CB Limited's nominee, Carrol Boyes Corporation, in exchange for
20 \$100 "as partial consideration for Parent [CB Limited] entering into the Wholesale
21 [Distribution] Agreement." (Subscription Agreement, ¶1.) CBUSD issued the stock
22 but never received the \$100 payment. As a result, CB Limited was able to name a
23 director to CBUSD's board of directors.

24 16. Under the terms of the Distribution Agreement and over the course of
25 dealing under that Agreement, CBUSD was required to and actually did engage in
26 the wholesale distribution business under a marketing plan or system prescribed in
27 substantial part by CB Limited in that CB Limited exercised control over CBUSD's
28 decisions as to which retailers it could sell to, control over the pricing and selection

1 of Products for sale, control over one member of the CBUSD's board of directors,
 2 control through almost daily instructions on CBUSD's sales efforts, control through
 3 its provision of sales information, and control through its mandated use of the
 4 "Trader" cash register system as the sole basis for reporting financial business
 5 information.

6 17. After securing this exclusive distributorship, CBUSD invested
 7 substantial time and many hundreds of thousands of dollars establishing its business
 8 in the marketplace. In the first instance, CB Limited's previous wholesale business
 9 operations in the United States were largely unorganized and its brand had been
 10 undermined for many years by rogue vendors selling the Products. CBUSD worked
 11 tirelessly and beyond the scope of its obligations under the Distribution Agreement
 12 to organize the wholesale operations and reclaim the "Carrol Boyes" brand. Among
 13 many other things, CBUSD:

- 14 • Organized and oversaw audits of the Products in the various warehouses;
- 15 • Created and thereafter revised a US Wholesale Catalogue, including an
- 16 electronic catalogue and Excel line sheet;
- 17 • Removed South Africa care cards from the packaged Products, replaced them
- 18 with US care cards, applied US labeling and repackaged over 9000 Products;
- 19 • Set up the Amazon website for sales of the Products and continue to maintain
- 20 the Products' presence on Amazon.com;
- 21 • Processed the Products back to stock from the inventory received from CB
- 22 Limited's store closing in New York;
- 23 • Participated in designing the Bloomingdale's Catalogue and created the
- 24 barcode labels and inner box masters and slaves for Products to be sold
- 25 through the Bloomingdale's stores;
- 26 • Organized, packaged and prepared web inventory for relocation to the new
- 27 warehouse including applying SKU's, separating and boxing the Products;
- 28



- 1 • Worked to shut down the rogue retailers who were selling the Products at a
- 2 discount on line and through other means including garage sales and flea
- 3 markets; and
- 4 • Demanded and obtained CB Limited's agreement to correctly mark the
- 5 Products' country of origin from South Africa, which was in most instances
- 6 inaccurate, to India, China and Indonesia, as required by US law

7 18. As a result of its efforts, in its first full year of operation CBUSD had

8 sales of \$343,498. CBUSD's placement of the Products for the first time in

9 Bloomingdale's was largely responsible for this success.

10 19. That number would have substantially increased in 2014 but for the

11 actions of CB Limited that caused CBUSD's gross sales to diminish below

12 expectations.

13 20. Under the Distribution Agreement, CBUSD agreed to generate

14 "aggregate gross sales to Wholesale Market Purchasers" in 2014 of at least

15 \$500,000. In early 2014, new management came in to CB Limited. From that point

16 on, CB Limited began to actively sabotage CBUSD's efforts to meet its targets and

17 grow the business.

18 21. CB Limited's most egregious conduct in this regard was its intentional

19 misappropriation of internet sales from CBUSD in violation of section 3 of the

20 Distribution Agreement. This provision required CB Limited to pay CBUSD 10%

21 of internet orders that were shipped to the US. Mr. Sender first became suspicious

22 that CB Limited was withholding internet orders in April 2014. When he brought

23 this up, Mr. Thies expressed embarrassment and told Mr. Sender the situation would

24 be rectified. No payment was ever received. Then in October 2014, web sales dried

25 up completely. When Mr. Sender queried the head of e commerce for CB Limited,

26 she lied saying they were having credit card processing problems. Mr. Sender then

27 queried Craig Ludwig the COO and he confirmed the lie. When Mr. Sender then

28 had two different people in the United States order from the CB Limited website,

1 each received shipments directly from CB Limited who made no attempt to account
2 for those sales to CBUSD. When Mr. Sender confronted CB Limited with this
3 undebatable evidence disproving the lie about credit card processing problems, CB
4 Limited forwarded a spreadsheet showing internet sales in October through
5 December 2014. Later, CB Limited forwarded another spreadsheet showing internet
6 sales from April 2014 through January 2105 CB Limited did not pay CBUSD for
7 any of these sales.

8 22. Similarly, CBUSD is informed and believes and on that basis alleges
9 that during 2014 CB Limited supported and sustained “Trunk Shows” of its products
10 in the United States where orders were fulfilled in and shipped from South Africa
11 and not accounted for to CBUSD in violation of section 3 of the Distribution
12 Agreement.

13 23. During 2014, CBUSD lost many sales because of CB Limited’s failure
14 to deliver the Products in a timely manner. CBUSD had placed the Products into
15 Bloomingdale’s, a coveted retailer. Bloomingdale’s purchase orders have a clause
16 that automatically cancels the order if the Products are not received by the agreed
17 time. CBUSD followed the agreed procedures in the Distribution Agreement for
18 such orders. When CB Limited failed to ship Products sold to Bloomingdales,
19 CBUSD lost many thousands of dollars in sales that were automatically cancelled.

20 24. In early 2014, CB Limited unilaterally increased its prices by a
21 substantial amount on many items in the US catalogue. In January 2014, Mr.
22 Sender and Mr. Thies were discussing price reductions, including the reduction of
23 prices that were “very much apparently out of line.” Within a short time, Ms. Boyes
24 reversed course and implemented a substantial price increase, unilaterally and
25 contrary to Mr. Sender’s advice and consent, based on her claim that the costs of the
26 Products had proportionally increased to her. CBUSD is informed and believes and
27 based thereon alleges that the price increase was not based on an increase in cost of
28 production, but was part of CB Limited’s effort to undermine CBUSD in its sales

1 and customer relationships. As a result, CBUSD lost almost one-third of its
2 customers and, most significantly, lost approximately half of its projected sales to
3 Bloomingdale's. Prior to the price increase, sales to Bloomingdale's alone were
4 projected to meet or exceed the \$500,000 annual requirement. After the price
5 increase, CBUSD was able to salvage only about half of this business.

6 25. Compounding this problem, CB Limited for some time in 2014
7 advertised prices on its website for South Africa substantially lower than those
8 offered in the US market. Even after accounting for the costs of shipping to the US,
9 the price differential was inexplicable and undermined CBUSD's efforts to justify
10 the price increase in the US.

11 26. The CB Limited Products are the most expensive products in their
12 category at Bloomingdale's. As such, the quality of those Products, including the
13 packaging and presentation, is critical to successful sales. While all other
14 manufacturer's products in this category maintain very high standards for packaging
15 and presentation, Bloomingdale's representatives complained that CB Limited's
16 Products fell significantly short. Its boxes were defective and made with poor
17 materials. They could not withstand normal shipping and even the colored finish of
18 the boxes would transfer to customers' hands.

19 27. In the Distribution Agreement, CB Limited warranted that its Products
20 would be free from defects in workmanship or materials. CBUSD worked with
21 Bloomingdale's and tried to work with CB Limited to improve its packaging and
22 presentation. Unfortunately, CB Limited failed to respond leaving its Products in
23 defective and substandard packaging reducing the sales CBUSD could otherwise
24 have made.

25 28. CBUSD was prepared and greatly desired to take the Products into
26 additional wholesale opportunities. CB Limited exercised control over CBUSD's
27 marketing efforts and vetoed lucrative retailers. Specifically, CBUSD generated
28 interest by JC Penny and Bed, Bath and Beyond. CB Limited refused to allow the

1 Products into these large retailers. In addition, CBUSD sought to bring the Products
2 to a vast audience with the websites Wayfair.com and RueLaLa.com. CB Limited
3 refused to allow CBUSD to sell to these sites for over a year and half. At the end of
4 October 2014, CB Limited finally approved a launch of Products on Wayfair.com
5 but limited the Products that could be sold. CBUSD has invested substantial money
6 and hours into preparing the data for sales on that site. However, because of CB
7 Limited's delays, CBUSD missed the crucial holiday season for 2014.

8 29. After sabotaging CBUSD's efforts for over a year, CB Limited sent a
9 letter terminating the Distribution Agreement effective February 17, 2015, and has
10 since then worked to take away the business and relationships that CBUSD spent
11 years and many hundreds of thousands of dollars to develop. As part of the grounds
12 for the termination, CB Limited cited CBUSD's predictable failure to reach
13 \$500,000 in sales for 2014. But for CB Limited's fraud, interference and extra
14 contractual conduct limiting CBUSD's performance and opportunities, CBUSD
15 would have succeeded in meeting and even exceeding the minimum sales obligation
16 outlined in the Distribution Agreement.

17 30. CB Limited also cited CBUSD's failure to pay \$61,245.02 to CB
18 Limited as a ground for termination. This claim relates to work that CBUSD
19 performed that was outside the scope of work as expressly defined in the
20 Distribution Agreement. For work beyond that scope, section 2.2(b) provides: "Any
21 other payments due from one party to the other shall be separately invoiced by one
22 party and paid by the other party within seven (7) days of receipt of invoice." From
23 the beginning of the Distribution Agreement in 2012, CBUSD performed services
24 outside the scope the Distribution Agreement and sent invoices totaling \$87,337.64
25 for that work as described generally in paragraph 17 above. For over a year and a
26 half CB Limited accepted the invoices without question and of course accepted the
27 benefit of CBUSD's work. With CB Limited's approval, CBUSD paid those
28 invoices from the receipts of the sales.

31. In early 2014, when new management came in to CB Limited, they raised questions about this practice for the first time. Mr. Sender spent numerous hours addressing these issues and even spent several days in South Africa meeting with new management and Mr. Thies to resolve the issues over the payment of the invoices without agreement.

32. After the February 17, 2015 letter, CB Limited cut CBUSD off from supply of its Products. CBUSD is informed and believes that CB Limited has taken US sales and distribution for its own account.

FIRST CLAIM FOR RELIEF

(Breach of Contract Against CB Limited)

33. CBUSD alleges and incorporates by reference each and every allegation contained in paragraphs 1 through 32 as though fully set forth herein.

34. The Distribution Agreement was a valid and binding agreement between CB Limited and CBUSD.

35. CBUSD has performed all covenants and obligations required on its part to be performed under the Distribution Agreement, except as excused by law or CB Limited's prior breach.

36. CB Limited breached the Distribution Agreement by fraudulently misappropriating internet sales in violation of sections 1.1, 3.1 and 3.3; failing to timely deliver Products in violation of sections 1.4(a) and 2.3; unilaterally forcing price increases on CBUSD in violation of section 2.1; delivering Products in defective and substandard packaging in violation of section 1.4(b); unreasonably restricting retailers to which CBUSD could sell its Products in violation of section 1.2; terminating the Distribution Agreement without proper cause in violation of sections 4.1 and 4.2; consistently and persistently failing to pay CBUSD within seven days in violation of section 2.2(a); and usurping CBUSD's entire business in violation of the express and implied terms of the Distribution Agreement in its entirety.

37. As a proximate result of CB Limited's breaches of the Distribution Agreement, CBUSD has been damaged in the amount of not less than \$2,000,000.

SECOND CLAIM FOR RELIEF

**(Breach of the Covenant of Good Faith and Fair Dealing
Against CB Limited)**

38. CBUSD alleges and incorporates by reference each and every allegation contained in paragraphs 1 through 37 as though fully set forth herein.

39. The Distribution Agreement contains an implied covenant of good faith and fair dealing obligating the parties not to do anything to unfairly interfere with the right of the other party to receive the benefits of the agreement.

40. CB Limited actively sabotaged CBUSD's efforts to meet its targets and grow the business as described more fully in paragraphs 20-28 above. CBUSD is informed and believes and on that basis alleges that CB Limited acted consciously and deliberately in bad faith to unfairly frustrate the agreed-upon purpose of the Distribution Agreement with the intent to take for itself the business CBUSD developed under the Distribution Agreement.

41. CBUSD has performed all of its duties and obligations required of it to be performed pursuant to the Distribution Agreement, except as excused by law or CB Limited's breach.

42. As a result of CB Limited's breach of the implied covenant of good faith and fair dealing, CBUSD has been damaged in the amount of not less than \$2,000,000.

THIRD CLAIM FOR RELIEF

(Franchisor's Failure to Register Franchise

[Corp. Code, §§ 31300, 31110] Against All Counterdefendants)

43. CBUSD alleges and incorporates by reference each and every allegation contained in paragraphs 1 through 42 as though fully set forth herein.



1 44. On or about June 21, 2012 at Mission Viejo, California, CB Limited
 2 and CBUSD entered into the Distribution Agreement (**Exhibit 1**) that by its terms
 3 and in its actual operation, described in paragraphs 13-16 above, amounted to a
 4 franchise agreement under the California Franchise Investment Law (the “CFIL”)
 5 (Corp. Code § 31200) and the California Franchise Relations Act (the “CFRA”)
 6 (Bus. & Prof. Code §20000, et seq.)

7 45. Contrary to Corporations Code § 31110, Counterdefendants failed to
 8 register the offer of the franchise described above with the California Commissioner
 9 of Corporations before offering and selling it to CBUSD.

10 46. CBUSD is informed and believe, and on that basis allege, that
 11 Counterdefendants’ failure to register the offer of the franchise as described above
 12 was willful in that, CB Limited has deliberately avoided regulation by the State of
 13 California insofar as the Licensing Agreement, by its terms and in its operation, also
 14 amounted to an unregistered franchise agreement under the CFIL for which CB
 15 Limited also failed to deliver an offering circular and insofar as CB Limited is and
 16 has been conducting intrastate business in the State of California for many years but
 17 has not registered to do business with the Secretary of State.

18 47. As a direct and proximate result of Counterdefendants’ failure to
 19 register the offer of the franchise as described above, CBUSD has sustained
 20 damages in an amount to be proven at trial.

21 48. CBUSD is informed and believes, and on that basis alleges, that, at all
 22 times mentioned in this counterclaim, Counterdefendants, Ms. Boyes and Mr. Thies,
 23 directly or indirectly controlled Counterdefendant CB Limited. Therefore, pursuant
 24 to Corporations Code section 31302, Counterdefendants Ms. Boyes and Mr. Thies
 25 are jointly and severally liable to CBUSD with and to the same extent as
 26 Counterdefendant CB Limited.

27 ///

28 ///

FOURTH CLAIM FOR RELIEF

(Franchisor's Failure to Deliver Offering Circular

[Corp. Code §§ 31300, 31119] Against All Counterdefendants)

49. CBUSD alleges and incorporates by reference each and every allegation contained in paragraphs 1 through 48 as though fully set forth herein.

50. Contrary to the requirements of Corp. Code § 31119, Counterdefendants sold a franchise to CBUSD that was subject to registration under the CFIL without first providing CBUSD with a copy of the offering circular and copies of all proposed agreements relating to the sale of the franchise at least 10 business days prior to CBUSD's execution of the Distribution Agreement.

51. CBUSD is informed and believes, and on that basis alleges, that Counterdefendants' failure to provide CBUSD with the documents described above was willful in that, CB Limited has deliberately avoided regulation by the State of California insofar as the Licensing Agreement, by its terms and in its operation, also amounted to an unregistered franchise agreement under the CFIL for which CB Limited also failed to deliver an offering circular and insofar as CB Limited is and has been conducting intrastate business in the State of California for many years but has not registered to do business with the Secretary of State.

52. As a direct and proximate result of defendants' failure to provide CBUSD with the documents described above, CBUSD has sustained damages in an amount to be proven at trial.

FIFTH CLAIM FOR RELIEF

(Franchisor Unlawfully Terminated Franchise

[Bus. & Prof. Code, § 20035] Against All Counterdefendants)

53. CBUSD alleges and incorporates by reference each and every allegation contained in paragraphs 1 through 52 as though fully set forth herein.

54. On or about June 21, 2012 at Mission Viejo, California, CB Limited and CBUSD entered into the Distribution Agreement (**Exhibit 1**) which by its terms

1 and in its actual operation amounted to a franchise agreement under the CFRA as
2 described in paragraph 13-16 above.

3 55. Pursuant to the terms of the franchise contract, CBUSD's franchise
4 continued without a fixed term. On or about February 17, 2015, CB Limited
5 notified CBUSD that the franchise was terminated immediately on the grounds that
6 CBUSD had not met the annual sales target and had not paid money that CBUSD
7 allegedly owed CB Limited.

8 56. Counterdefendants' termination of CBUSD's franchise was not in
9 accordance with Business and Professions Code sections 20020 or 20021 because
10 Counterdefendants did not have good cause to terminate the Distribution Agreement
11 as otherwise required by these statutes.

12 57. As a direct and proximate result of the wrongful termination of the
13 Distribution Agreement, CBUSD is entitled to recover its damages in the amount of
14 not less than \$2,000,000 pursuant to Business and Professions Code section 20037.

15 **SIXTH CLAIM FOR RELIEF**

16 **(Breach of Fiduciary Duty Against CB Limited)**

17 58. CBUSD alleges and incorporates by reference each and every
18 allegation contained in paragraphs 1 through 57 as though fully set forth herein.

19 59. In the alternative, CBUSD and CB Limited engaged in a joint venture
20 implied by their conduct acting together beyond the express and implied terms of
21 the Distribution Agreement:

22 a. In an effort to establish the "Carrol Boyes brand" here in the
23 United States, CBUSD and CB Limited combined their property, skill, and
24 knowledge with the intent to carry out this business enterprise;

25 b. CBUSD and CB Limited each had an ownership interest in the
26 business enterprise;

27 c. CBUSD and CB Limited each had joint control over the business
28 enterprise as CBUSD conducted the business and CB Limited exercised control over



1 most aspects of the business including control over CBUSD’s decisions as to which
 2 retailers it could sell to, control over the pricing and selection of Products for sale,
 3 control over one member of the CBUSD’s board of directors, control through almost
 4 daily instructions on CBUSD’s sales efforts, control through its provision of sales
 5 information, and control through its mandated use of the “Trader” cash register
 6 system as the sole basis for reporting financial business information. In addition, as
 7 part of the joint venture business enterprise, CB Limited directed and controlled
 8 CBUSD’s activities beyond the scope of the Distribution Agreement as forth in
 9 detail in paragraph 17 above. CB Limited also exercised control over the joint
 10 business through its ownership of 5% of the stock of CBUSD and thereafter the
 11 appointment of Mr. Thies as a member of CBUSD’s board of directors; and

12 d. CBUSD and CB Limited agreed to share the profits and losses of
 13 the joint business enterprise as expressed in their share of revenues from the sale of
 14 the Products with CB Limited bearing the risk of loss on the inventory.

15 60. As a member of the joint venture, CB Limited owed CBUSD a
 16 fiduciary duty to act in the highest degree of fidelity and care with respect to the
 17 joint venture business.

18 61. In its determination to obtain for itself the valuable and growing joint
 19 business enterprise, including the valuable relationship with Bloomingdale’s and the
 20 valuable work done to put up the Products on Wayfair.com, CB Limited breached
 21 its fiduciary duty by actively sabotaging CBUSD’s efforts to meet its targets and
 22 grow the business as described more fully in paragraphs 20-28 above. CBUSD is
 23 informed and believes and on that basis alleges that CB Limited acted consciously
 24 and deliberately in bad faith to unfairly frustrate the agreed-upon purpose of the
 25 joint business enterprise with the intent to take for itself the business CBUSD
 26 developed under that enterprise.

27 62. As a result of CB Limited’s breach of fiduciary duty, CBUSD has been
 28 damaged in the amount of not less than \$2,000,000.

SEVENTH CLAIM FOR RELIEF

(Fraud and Deceit [Civ. Code § 1709] Against CB Limited)

63. CBUSD alleges and incorporates by reference each and every allegation contained in paragraphs 1 through 62 as though fully set forth herein.

64. Mr. Sender first became suspicious that CB Limited was withholding internet orders in April 2014. When he brought this up, Mr. Thies expressed embarrassment and told Mr. Sender the situation would be rectified. No payment was ever received. Then in October 2014, web sales dried up completely. When Mr. Sender queried the head of e commerce for CB Limited, she lied saying they were having credit card processing problems. Mr. Sender then queried Craig Ludwig the COO and he confirmed the lie. When Mr. Sender then had two different people in the United States order from the CB Limited website, each received shipments directly from CB Limited who made no attempt to account for those sales to CBUSD. When Mr. Sender confronted CB Limited with this undebatable evidence disproving the lie about credit card processing problems, CB Limited forwarded a spreadsheet showing internet sales in October through December 2014. Later, CB Limited forwarded another spreadsheet showing internet sales from April 2014 through January 2105 CB Limited did not pay CBUSD for any of these sales.

65. CB Limited's claim that it was having credit card processing problems as a basis for not paying CBUSD its agreed portion of internet sales was the suggestion, as a fact, of that which is not true, by one who does not believe it to be true or who has no reasonable ground for believing it to be true.

66. CB Limited's deceit caused CBUSD to lose money on internet sales it was otherwise entitled to. As a result, CBUSD has been damaged in an amount according to proof at the time of trial.

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EIGHTH CLAIM FOR RELIEF

(Breach of Fiduciary Duty Against Mr. Thies)

67. CBUSD alleges and incorporates by reference each and every allegation contained in paragraphs 1 through 66 as though fully set forth herein.

68. As a member of CBUSD's board of directors, Mr. Thies owed a fiduciary duty to act in the highest degree of fidelity and care with respect to CBUSD's business.

69. From early 2014, CB Limited began actively sabotaging CBUSD's efforts to meet its targets and grow the business as described more fully in paragraphs 20-28 above as part of its efforts to obtain for itself CBUSD's valuable and growing business, including the valuable relationship with Bloomingdale's and the valuable work done to put up the Products on Wayfair.com. CBUSD is informed and believes and on that basis alleges that CB Limited acted consciously and deliberately in bad faith to unfairly frustrate the agreed-upon purpose of the joint business enterprise with the intent to take for itself the business CBUSD developed under that enterprise.

70. CBUSD is informed and believes and on that basis alleges that as an officer and employee of CB Limited, Mr. Thies knew, or in the exercise of ordinary care should have known, that CB Limited was engaged in this bad faith conduct. As a member of CBUSD's board of directors, Mr. Thies had a fiduciary duty to inform CBUSD about and to protect CBUSD from CB Limited's actions.

71. Mr. Thies breached his fiduciary duty by failing to inform CBUSD about and to protect CBUSD from CB Limited's bad faith actions. As a result, CB Limited was able to sabotage CBUSD's sales creating a pretext for it to terminate the Distribution Agreement and usurp CBUSD's business. CBUSD is informed and believes and on that basis alleges that had Mr. Thies informed and protected CBUSD from CB Limited's bad faith actions, CBUSD would not have lost its business under the pretext of lack of sales.

72. As a result of Mr. Thies's breach of fiduciary duty, CBUSD has been damaged in the amount of not less than \$2,000,000.

PRAYER FOR RELIEF

WHEREFORE, CBUSD prays for judgment against Counterdefendants CB Limited, Carrol Boyes and David Thies, and each of them, as follows:

1. For compensatory damages in an amount to be determined according to proof at the time of trial, but not less than \$2,000,000;
2. For prejudgment interest from the earliest date and at the highest rate permitted by law;
3. For exemplary and punitive damages according to proof;
4. For costs of suit herein incurred; and
5. For such other and further relief as the Court may deem just and proper.

DATED: April 8, 2015

JULANDER, BROWN & BOLLARD

By: 

Dirk O. Julander
Attorneys for Defendant and
Counterclaimant Carrol Boyes US
Distribution, Inc., a California Corporation
and Barry Sender

DEMAND FOR JURY TRIAL

Defendant Barry Sender and Counterclaimant, Carrol Boyes US Distribution, Inc., a California Corporation, demand a jury trial in the above-captioned matter.

DATED: April 8, 2015

JULANDER, BROWN & BOLLARD

By:



Dirk O. Julander

Attorneys for Defendant Barry Sender and
Counterclaimant Carrol Boyes US
Distribution, Inc., a California Corporation

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Orange, State of California. My business address is 9110 Irvine Center Drive, Irvine, CA 92618.

On April 8, 2015, I served true copies of the following document(s) described as **FIRST AMENDED COUNTERCLAIM** on the interested parties in this action as follows:

Jeff E. Scott
Jordan D. Grotzinger
Greenberg Traurig, LLP
1840 Century Park East, Suite 1900
Los Angeles, CA 90067

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on April 8, 2015, at Irvine, California.

Dorvs Duran
Dorvs Duran